Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JACK MARSHALL, Petitioner

v.

COUNTY OF SAN BERNARDINO, ET AL, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can due process rights under 42 USC 1983 and the Fourteenth Amendment be ignored when they are violated by actions of County Marshals in evicting the petitioner from his home on Monday, July 10, 1989 without prior notice of the date or time just because the County Marshal's office carries out some 40 or 50 evictions a year without advance notice in situations in which a bankruptcy or other stay has been in force for 2 - 4 months? The date originally set by the Marshal for the eviction, March 20, 1989, which had come and gone because of a bankruptcy stay and a State Court temporary restraining order obtained by petitioner's wife through whom he claimed the right to possession.

2. Whether an attorney for a litigant is a wilful participant in joint action with the state and therefore acting under color of state law within the

meaning of 42 USC 1983 when he insists that a county marshal carry out an eviction without notice, accompanies the marshal to the location of the eviction, goes to the door with the county marshal, enters the residence with the county marshal; with their guns drawn, and participates in ordering the persons in the residence to leave immediately?

3. Whether Fourth Amendment rights were violated when an attorney for a litigant and a county marshal come into a residence with a writ of possession with their guns drawn when there was no indication that force would be used to stop the eviction especially since there was no notice?

4. Whether Fourth Amendment rights were violated after the seizure of a residence pursuant to a writ for possession, and a warrantless search: which included but not limited to drawers

dumped on the floor, couch turned over and pictures knocked off the wall; petitioner's personal property by sheriff's deputies, deputy marshal's and attorney for ligitant?

5. Whether 11 USC Sec 362 and 1301 (a) was violated when a writ of possession was issued during the Chapter 13 stay?

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LIST OF ALL PARTIES

Floyd Tidwell, Sheriff, as Sheriff and personally; John W. Finck as Marshal and personally; thirty-two unknown named Deputy Sheriffs and Marshal's of the

County of San Bernardino; Four unknown named employees of the Department of Mental Health of the County of San Bernardino; Walter Innenberg, Respondent.

Related case of Schneider v. County of San Bernardino, Appeal # 92-55991, D.C. No. CV-91-0237-AHS arises out of the same incident and involves similar factual and legal issues.

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STATUTES

This case involves 42 USC 1983, which provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding tor redress. For the purposes of this sectionm any Act of Congress applicable exclusively to the District ot Columbia shall be considered to be a statute of the District of Columbia.

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

Jack Marshall,
Petitioner

v.

County of San Bernardino ET. AL.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE ONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW, JACK MARSHALL, the petitioner here in, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on August 15, 1994.

OPINIONS BELOW

The August 15, 1994, opinion of the Court of Appeals, whose judgement is herein

sought to be reviewed, is reported as Case No. 92-55994 D.C. No. CV-89-0799-AHS, Memorandum, unpublished, and is reprinted in Appendix A to this Petition, pp. A1 - A21. The Order on Petition for rehearing is reprinted in Appendix B pp. B1. The prior opinion of the United States District Court for the Central District of California entered July 27, 1992, is reported at SACV-89-799 A.H.S. (RwRx) unpublished and is reprinted in Appendix C to this Petition, pp. C1 - C7. The Order Dismissing Action and Entering Judgment in Favor of Defendant Walter Innenberg filed and entered July 27, 1992 is reprinted in Appendix D to this Petition, pp. D1 - D5.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was entered on August 15, 1994. The jurisdiction of this Court is invoked pursuant to 28 USC Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the unreasonable

searches and seizures clause of the Fourth Amendment to the Constitution of the United States.

This case also involves the first section of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

This law suit was filed on November 16, 1989 by Jack Marshall and Paula Dolliver-Marshall against the County of San Bernardino and various individuals including Walter Innenberg. Plaintiffs sought damages under the Fourth and Fourteenth Amendment, 42 USC 1983, and 11 USC Sec 362, and 1301(a) Statues arising out of their eviction from their home on July 10, 1989.

In 1988 and 1989, Paula Marshall, petitioner's wife, was engaged in a legal battle with persons named

Martin concerning ownership and possession of the Yucca Street residence.

Respondent Walter Innenberg is an attorney and represented the Martins in their actions against Mrs. Marshall. Innenberg is also a Reserve Deputy Sheriff, which on July 10 he stated he did not act in that capacity.

On March 8, 1989, Mrs. Marshall filed a Chapter 13 bankruptcy petition, No. SBX 01924 MG. On March 13, 1989 judgment was entered for the Martins against Mrs. Marshall in an unlawful detainer action. The execution was issued on March 13, 1989.

On March 14, 1989 the San Bernardino County Marshal's office served a notice to vacate the property at 18584 Yucca Street by March 20, 1989. They were later informed of the bankruptcy. Thereafter, Mrs. Marshall voluntarily dismissed the pending Chapter 13 petition because of technical problems with the filing.

Stephanie Schneider, petitioner's

daughter, filed a Claim of Right to Possession of the property on May 9, 1989. It was rejected by the Victorville Municipal Court. On May 13, 1989, Mrs. Marshall filed another Chapter 13 bankruptcy petition, No. SBX 89-04205 MG. On May 26, 1989, Mrs. Marshall filed an action in the San Bernardino County Superior Court, Docket # VCV013425, challenging the Martins' right to title and possession of the Yucca Street residence, seeking a declaration that she owned the property and seeking injunctive relief. Based upon this complaint, a temporary restraining order was entered by the Superior Court on May 30, 1989 prohibiting the Martins from "taking any actions whatsoever to obtain possession of the subject property". The TRO was effective until June 22, 1989.

On May 31, 1989, a hearing was held on the Martins' motion for relief from stay in the pending bankruptcy action. Mrs.

Marshall attended that hearing. Mrs. Marshall was aware in June that the stay had been lifted. Under the Rule 116 of the Bankruptcy Court of the Central District of California, " orders . . shall be prepared by the attorney for the prevailing party . . ." and submitted to the Court within 7 days after the grant thereof. Innenberg did not do this.

On June 22, 1989 a settlement was reached between Mrs. Marshall and the Martins, requiring Mrs. Marshall to pay the Martins $3,000 no later than June 29, 1989 and $30,000 no later than August 6, 1989.

Upon receipt of the payments the Martins were to deliver to her a quitclaim deed. The agreement also provided that:

> "2. Plaintiffs shall be allowed to remain in possession of the premises commonly known as 18584 Yucca Street, Hesperia, CA until August 6, 1989 on the following terms and conditions: a. (payment of $3000 by June 29) and b. (payment of $30,000 by August 6, 1989) . . .
>
> "4. Should any payment provided for

> hereunder not be received by counsel for defendants on or before the due date, a writ of possession for the subject premises may issue and be enforced forthwith under Victorville Municipal Court Case no. C 19133, judgment for possession of said premises having already been rendered on March 13, 1989. (emphasis supplied)

While the Judge did not sign the settlement, the parties did. Mrs. Marshall did not make the payments called for in the settlement agreement.

On Friday, July 7, 1989, the order from the May 31 hearing lifting the stay was entered. Mrs. Marshall was not notified of the entry of the order lifting the stay nor of the date or time of the eviction. On Monday, July 10, 1989, Innenberg took a certified copy of the order lifting the automatic stay to the Victorville office of the San Bernardino County Marshal and asked a clerk "How soon can we go ahead with this eviction?" She went into the back of the office and Lieutenant Daily, known to Innenberg as the Commander of the Victorville Marshal's Office, came out and

said "Normally we would post this." Innenberg asked it that was a requirement and Daily stated that it was "just an officer safety thing."

Innenberg responded, "Well, if you repost this, I can guarantee you before the day is out that you post it, she'll be down in the Bankruptcy Court filing another petition, and we are going to be right back where we started from." There is no evidence that any notice of eviction was given to anyone in the Marshall family after the notice dated March 13, 1989. A notice of eviction for July 13, 1989 was mailed to the Yucca Street Residence on July 10 and received by Mrs. Marshall the day after the eviction.

Daily assigned Deputy Weinberg, a San Bernardino County Marshal, to perform the eviction. Innenberg and Weinberg went to the premises together. There is no contention that as Innenberg and Weinberg approached the residence, either of them had

any indication that the petitioner or any member of his household would physically resist the eviction.

When Weinberg and Innenberg came through the door, Stephanie Schneider screamed that "They're here to evict us immediately." Mr. Marshall heard the front door being thrown open and went out the door of the bedroom. He saw Innenberg and another man who he subsequently learned was a deputy marshal running towards his bedroom with their guns drawn. As soon as Innenberg and Weinberg saw Mr. Marshall they pointed their guns at him. Innenberg said, "You have to leave immediately." Mr. Marshall then picked up an unloaded .22 Calibre rifle that had been left leaning against the wall. He held it across his chest muzzle pointed upwards. Throughout the entire incident he never pointed gun at anyone. He said "We won this in Superior Court."

Shortly after this Mr. Marshall

retreated to his room. A man who identitied himself as a deputy sheriff spoke to him through the door. The first thing that Mr. Marshall said was "Let me speak to Paula." He asked who she was, and Mr. Marshall told him that Paula was his wife. The man asked Mr. Marshall to open the door but Mr. Marshall said that he wanted to speak to his wife first. Mr. Marshall repeatedly told him "Let me talk to Paula and we can get this straightened out." Later another deputy called him on the phone. He asked Mr. Marshall to put down the gun and come out. Mr. Marshall told him that the gun was not loaded and that his son Chris had already told them that. The sheriff repeatedly asked Mr. Marshall to come out. Mr. Marshall repeatedly asked to speak with Paula and assured them that they would work it out so long as he could speak with his wife.

At one point the officer on the phone said to Mr. Marshall "There is no paperwork.

We are going to let you remain in the home. All we want to do is make sure nobody is hurt and you put down your rifle."
He said that they could go to court the next day and straighten it out. The deputy sheriff told Mr. Marshall that he would not be arrested. Mr. Marshall agreed to this if he could speak with his wife. He was permitted to do so and she confirmed that she too had been promised this arrangement.

Mr. Marshall left the unloaded gun in his bedroom and walked out. Mr. Marshall was in the bedroom 5 and 1/2 hours to six hours. He would have come out immediately had he been permitted to speak with his wife. When he left the room, he was arrested.

After her husband was taken from the house Mrs. Marshall was arrested and brought back into the house and questioned by Sheriff's Deputies. She was placed in a chair in the dining area and she could observe the front room, the hallway, the

kitchen and into some of the bedrooms. They questioned her for 45 minutes trying to get her to admit that her husband was a drug dealer. She told them that they were wrong. At that time she saw and heard various Sheriff's Deputies and County Marshals searching personal possessions of herself and her family members. She repeatedly told them that they had no right to go through their things and to keep their hands off of them. They ignored her. She saw Innenberg, at this point wearing a deputy sheriff's badge, bullet proof vest, gun and holster, helping the other county officers in the process of searching the home. She saw no warrant. The Sheriff's deputies did not refer to a warrant. Mrs. Marshall did not give the Deputy's permission for the search. Mr. Marshall never consented to a search of his possessions. Mr. Marshall has never sold illegal drugs nor has he ever been charged with doing so or has done anything

that would give probable cause to search his personal belongings.

REASONS FOR GRANTING THE WRIT

The judgement of the United States Court of Appeals for the Ninth Circuit should be reviewed by this Court because the panel found that a family in possession of real property had no due process right to at least one day's advance notice as to the date and time of their eviction from their home so that they could move their sons cremated remains, any clothing, personal effects and household goods (see Fuentes v. Shevin, 407 U.S. 67, 80 (1972) due process right in continuous possession of household goods) is an error of law of exceptional importance because it fails to enforce recognized due process rights. "Notice is perhaps the fundamental of due process rights." U.S. v. Merchant, 760 F.2d 963, 966 (9th Cir. 1985). Even if the notice of eviction was valid on March 14, 1989, when it was given, by July 10 the

date set for eviction had come and gone without the eviction having occurred. The notice of March 20 was therefore stale by virtue of the passage of time. Common sense tells us that an eviction notice for March 20 cannot be good notice of an eviction three months later on July 10. Further, the force and effect of the notice had been removed by virtue of the stay from the two Chapter 13 petitions filed by Mrs. Marshall, by the State Court TRO, and by the settlement.

Due process requires that the "best notice practicable in the circumstances" and notice "such as one desirous of actually informing (the plaintiff and his family) might reasonable adopt." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 315, 94 L.Ed. 865 (1950). See also Robinson v. Hanrahan, 409 U.S. 38, 40; Silber v. Mabon, 957 F.2d 697 (9th Cir. 1992); Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 14 (1978); and

Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1410 (9th Cir. 1989). The notice of March 14, 1989 did not measure up to these standards. Defendants assert that Plaintiff and his family had no right to notice of the date and time of the eviction under California statutory law. CCP Sec. 715.020. Plaintiffs do not deny this. However, the plaintiffs' right to notice comes from the due process clause, a higher authority than a statute. As applied in this case to permit eviction without notice of the date, the statute is unconstitutional because it does not specify that notice shal be given in advance of eviction. In Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989) this Court held that:

> In determining whether substantive due process rights have been violated, we will look to such factors as the need for the

governmental action in question, the relationship between the need and the action, the extent of the harm inflicted, and whether the action was taken in good faith or for the purpose of causing harm. (Citations omitted) To be sure, governmental entities must have much latitude in carrying out their police power responsibilities; mere errors of judgment or actions that are mistaken or misguided, do not violate due process. But malicious, irrational and plainly arbitrary actions are not within the legitimate purview of the state's power." 882 F.2d at 1409.

The Supreme Court has held that right of a seller of chattels to immediate possession of the property to which he may have a contract right was not an "important governmental or general public interest" justifying a sacrifice of due process rights. Fuentes v. Shevin, supra, 407

U.S. at 92 & 93. That is even more true in this case. The house and land were not going to go anywhere. Clearly, there would have been no harm to the government or to any party to wait 24 or 48 or even 72 hours while notice was given. U.S. v. James Daniel Good Property, 971 F.2d 1376, 1382-1384 (9th Cir. 1992). There was no reasonable relationship between the governmental interest in this case, i.e., the orderly processing of the writ and the County Marshal's action of performing the eviction immediately and without prior notice. The harm intlicted was substantial, the Plaintiff was evicted from his home without any notice and lost many of his personal belongings, including the ashes of his son.

Due process rights can be sacrificed in an emergency or in extraordinary situations. However, "summary seizure of a person's possessions when no more than private gain is directly at stake" is not

such an extraordinary situation as to justify sacrificing a party's due process rights. Fuentes v. Shevin, supra, 407 U.S. at 92 & 93. The stated reason, to prevent Mrs. Marshall from filing what Innenberg considered to be another frivolous bankruptcy, merely demonstrates the maliciousness and bad faith of both the County Marshal and Innenberg. Many attorneys justifiably believe, and many more assert, that the opposition to their positions are frivolous and are made in bad faith. However the remedy for vexatious filings is to seek redress in court. Courts can restrain vexatious litigants and courts regularly impose sanctions for frivilous filings. But these are determinations for a judge, after notice and a hearing. On this record, there is no basis on which the County Marshal could brand Mrs. Marshall a vexatious litigant. Innenberg and the County Marshal, by evicting the occupants of the Yucca Street residence

without prior notice of the date of eviction because of the fear of additional litigation, usurped the power of the courts.

An official of the County, Lieutenant Daily, the commander of the Victorville Marshal's office, admitted at deposition the he had the authority to make the decision to evict without notice. He also admitted that, after a consideration of the alternative of giving notice and after consultation with his superiors, he decided to go forward with the eviction. Lieutenant Daily testified at deposition that the Victorville division of the County Marshal's office carried out some 40 or 50 evictions a year without advance notice in situations in which a bankruptcy or other stay had been in force for 2 - 4 months.
This testimony demonstrates an illegal county policy or custom. One could hardly think of better evidence of a policy or custom than the admission of it by the officer in charge. Larez v. City of Los

Angeles, 946 F.2d 630, 645 (9th Cir. 1991).

The district court did not reach the issue of whether Innenberg illegally searched plaintiff's belongings because it found, erroneously the plaintiff argues, that Innenberg was not acting under color of state law. Innenberg asked the San Bernardino County Marshal to perform the eviction when he knew that the Plaintiffs had no prior notice of the date of eviction, except for the stale and vitiated notice of March 14. He helped Deputy Marshal Weinberg perform the eviction. He, together with Marshal Weinberg, entered the home and gave instructions to various adult residents including the Plaintiff that they had to leave the residence immediately. He participated in the illegal search of the personal possessions in the house.

A willful participant in joint action with the state or its agents acts "under color of" state law. Adickes v. S.H.

Kress & Co, 398 U.S. 144, 152, 26L.Ed.2d 142 (1970). Clearly the state actors and Innenberg were both involved in the wrongful conduct. Innenberg was most certainly a willful and eager participant in the eviction and the search. Howerton v. Gabica, 708 F.2d 380 (9th Cir. 1983), Fuentes v. Shevin, 407 U.S. 67, 32 L.Ed. 2d 556 and Sable Communications of California, Inc. v. Pacific Telephone and Telegraph Company, 890 F.2d 184, 189 (9th Cir. 1989). Even if Innenberg had done nothing more than institute an illegal eviction process on July 10, 1989 and did not otherwise participate he would be liable. See Davis v. Mills, 73 F.2d 744 (5th Cir. 1989) cert. den. 479 U.S. 1989 and Del's Big Saver Foods v. Carpenter Cook, 705 F.2d 1344 (7th Cir. 1986).

The issue raised in Plaintiff's opposition to the County Defendants' Motion for Summary Judgment upon the Plaintiff's excessive force claim. In its

opposition to this motion the plaintiff pointed out that there was an additional excessive force claim, i.e., coming to the house with drawn guns. The trial court never met the issue directly but entered judgment against the plaintiff on the excessive force claim. There are two possible standards by which the plaintiff's remaining excessive force claim, the due process clause "shocks the conscience" standard and the Fourth Amendment reasonableness standard. Plaintiff suggest that the proper standard is the "shocks the conscience" test of substantive due process, but the actions of Weinberg (not a defendant herein) and Innenberg in coming to the Marshall residence with their guns drawn with no justification, violates both standards.

Clearly, entry into the home of armed men is a substantial intrustion on the Plaintiff's Fourth Amendment rights. The paramount purpose of the Fourth Amendment

is to protect people in their homes from being disturbed by the state. United States v. Becker, 23 F.3d 1537 (9th Cir. 1994). There was, in fact, no governmental interest to be served in coming to the door and entering the house with drawn guns. While the eviction had been bitterly contested in the courts, there was no indication whatsoever that force would be used by the Marshall family to prevent the eviction. Officer protection is not an interest that is served by entering a home with drawn guns. It causes more potential breaches of the peace, as it did in this case.

On a motion for summary judgment, Plaintiffs are entitled to inferences in the light most favorable to them. Clipper Express v. Rocky Mountain Motor Tariff, 690 F.2d 1240, 1250 (9th Cir. 1942). The evidence on the illegal search was that the search occurred in the front room, the hallway, the kitchen and some of the

bedrooms. The Panel's determination that there was no evidence that Plaintiff's possessions were searched even when it has been stated that the house was "torn apart" with pictures knocked off the walls, shelves pulled down, couch turned over, china cabinet moved and contents of drawers dumped on the floor did not give the Plaintiff's the benefit of these inferences. While Plaintiff's may have a difficult time establishing exact damages at trial, nominal damages are available for a Fourth Amendment violation. Larez v. City of Los Angeles, 946 F.2d 630, 640 (9th Cir. 1991). What occurred here is a clear interference by Innenberg and the County with the Plaintiff's right to the possession of their personal property. This was a seizure in violation of their Fourth Amendment rights. G & G Jewelry, Inc. v. City of Oakland, 989 F.2d 1093, 1094 (9th Cir 1993).

The writ of March 14, 1989 and the proceedings underlying the writ were in

violation of the Chapter 13 bankruptcy stay, 11 USC Sec 362 and 1301 (a), and theretore void. In Re Schwartz, 954 F.2d 569, 571 - 572 (9th Cir. 1992). This Court held in the context of a Chapter 7 proceeding that creditors and lein holders do not have standing to object to the violation of the automatic stay. In Re Pecan Groves of Arizona, 951 F.2d 242 (9th Cir. 1991). However, this Court has also ruled that those persons whom Congress has designated as beneficiaries of a bankruptcy stay have standing to assert its violation. In Re Brooks, 871 F.2d 89, 90 (9th Cir. 1989). In Chapter 13 cases Congress has extended the scope of the stay to include co-debtors on consumer debts. 11 USC Sec 1301 (a) provides that:

> a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor . . . .

The section is designed "to protect a debtor

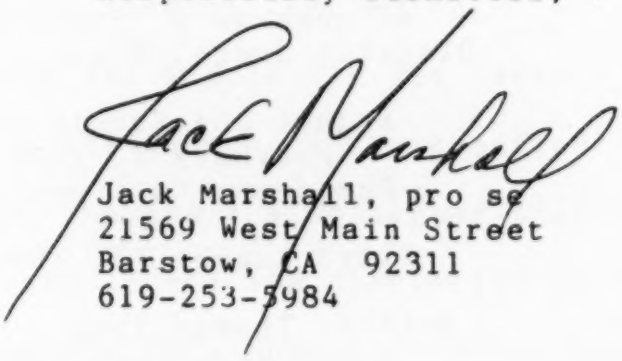
operating under a Chapter 13 individual repayment plan case by insulating him from indirect pressures exerted through friends or relatives that may have cosigned an obligation of the debtor." House Judiciary Report (H Rept. no. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 426). Thus, the stay of Section 362, is expanded in Chapter 13 cases, to protect family members. Enforcement of the rights of the family members to possession of the family home, rather than subverting the purposes of the bankruptcy act, will, in fact, further the protections given to a wage earner under Chapter 13. A family member has a strong personal stake in the outcome of an eviction proceeding relating to the house in which he or she lives. Certainly the Plaintiff in this case suffered an actual injury as a result of the violation of the Chapter 13 stay. Baker v. Carr, 369 U.S. 186, 204 (1962). Even if the order for eviction was not directed at him,

Plaintiff has standing if they were affected by the writ. Bergquist v. County of Cochise, 806 F.2d 1364 (9th Cir. 1986).

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that its petition for a writ of certiorari be granted.

Respectfully submitted,



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APPENDIX A

Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACK MARSHALL,
Plaintiff-Appellant,

v.

SAN BERNARDINO COUNTY, et al.,
Defendants-Appellees

NO. 92-55994

D.C. NO.
CV-89-0799-AHS

MEMORANDUM

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Appeal from the United States
District Court for the
Central District Of California
Alicemarie H. Stotler,
District Judge, Presiding

Argued and Submitted
February 3, 1994
Pasadena, California

Filed August 15, 1994

Before: Thomas Tang
Harry Pregerson and,
John T. Noonan, Jr. Circuit Judges.

Jack Marshall and Jaime, Scott and Jeremy Schneider (collectively the "appellants") appeal the district court's orders granting the defendants' motions for summary judgment. 1 All of the appellants make the following arguments: (1) that the district court erred in failing to address

their substantive due process claims; (2) that the district court erred in finding procedurally sufficient the March 14, 1989 notice to vacate; (3) that the district court erred in finding that they lacked standing to attack a violation of the automatic stay imposed pursuant to Paula Marshall's second personal petition for bankruptcy; and (4) that the district court erred in finding that Walter Innenberg was not liable for his participation in the search of the appellants' possessions. Marshall also argues that the district court abused its discretion in not allowing him to withdraw or amend his admissions under Rule 36 of the Federal Rules of Civil Procedure and that the district court erred in finding that

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1. Marshall and the Schneiders named as defendants the County of San Bernardino, Sheriff Floyd Tidwell, Marshal John Finck, and Walter Innenberg. Marshall also named as defendants thirty-two unknown named deputy sheriffs and deputy marshals of the County of San Bernardino and four unknown named employees of the department of mental health of the County of San Bernardino.

there was no evidence of the use of excessive force. The Schneiders also argue that the district court abused its discretion in denying their motion to reopen discovery. We affirm.

BACKGROUND

Paula Marshall's home, which she occupied with her husband Jack Marshall, her daughter Stephanie Schneider, Stephanie's minor children, Jaime, Scott and Jeremy Schneider, her son Christopher Marshall, and Stephanie's boyfriend Justin Decard, was sold at a foreclosure sale to James Martin ("Martin"). Immediately following the sale, Martin served a three day notice to quit or pay rent. When the occupants refused to quit or pay rent, Martin initiated eviction proceedings.

On March 14, 1989, a San Bernardino County Marshal served the occupants with a writ of possession and a notice to vacate. According to the notice, the occupants were to vacate the premises by

March 20, 1989 or be forcibly evicted. To prevent their impending eviction, the occupants filed various actions including multiple and successive petitions for bankruptcy, a claim of possession action and a declaratory relief action seeking to set aside the sale of the home to Martin. A temporary stay of eviction was granted with each new action filed.

In July of 1989, when all of the temporary stays of eviction had either expired or been removed, Martin sought to have the occupants forcibly evicted under the authority of the March 14th notice. Upon learing of the occupants' history of filing actions to avoid eviction, the San Bernardino County marshals office agreed to perform the eviction without the occupants being served again with a new notice. While the usual procedure was to serve a new notice after a temporary stay of eviction had expired or been removed, this proce-

dure was for the purpose of officer safety only and not a legal requirement.

The eviction was to be performed by a single San Bernardino County deputy marshal accompanied by Martin's attorney, Walter Innenberg ("Innenberg"). However, when one of the occupants, Jack Marshall, refused to leave and barricaded himself in his bedroom with a .22 calibre rifle, reinforcements were requested from the marshal's office and the sheriff's office. After a six hour standoff, Jack Marshall was persuaded to leave his bedroom and was arrested.

After Jack Marshall's arrest, Paula Marshall was brought back into the home for questioning. She alleges that during the questioning she saw Innenberg, who was a reserve deputy sheriff, wearing a deputy sheriff's badge, bullet proof vest, gun and holster. She also alleges that she heard the deputy sheriffs, the deputy marshals and Innenberg searching through the personal possessions of some of the occupants.

The occupants filed actions in federal

district court alleging various constitutional violations and requesting relief under 42 U.S.C. s 1983. Schneider v. County of San Bernardino was filed by Stephanie Schneider, on her own and on behalf of her minor children, Jaime, Scott and Jeremy Schneider, Christopher Marshall, and Justin Dekard. The claims of the adult plaintiffs were dismissed, however, because they were not filed within the time periods of the relevant statute of limitations, leaving only Jaime, Scott and Jeremy Schneider as plaintiffs. Marshall v. County of San Bernardino was filed by Jack and Paula Marshall. Paula Marshall voluntarily dismissed her claims. The district court granted the defendants' motion for summary judgement in each case.

DISCUSSION

I. Sutficiency of Notice 2

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2. The appellants argue that the district court erred by not ever ruling on their substantive due process claims. The claims referred to as substantive due process claims by the appellants, however, all concern the

The appellants argue that they should have been served with a new notice to vacate before they were evicted on July 10, 1989 because the notice served on March 14, 1989 had become stale. They argue that the failure to serve a new notice violated their due process rights. We disagree.

"For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right, they must first be notified." Fuentes, 407 U.S.

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2. sufficiency of the notice to vacate. Claims challenging the sufficiency of notice are procedural due process claims, not substantive due process claims, and the district court correctly treated them as such. See Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (concluding that notice is the central meaning of procedural due process); Zinermon v. Burch, 494 U.S. 113,125 (1990) (holding that a substantive due process claim refers to certain actions in which the government may not engage no matter how many procedural safeguards it employs, while a procedural due process claim refers to the deprivation by state action of a constitutinally protected interest in life, liberty or property without due process of law).

at 80 (quotation marks and citations omitted). Additionally, the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." Id. (quotation marks and citations omitted). The purpose of this requirement is two-fold: "to ensure abstract fair play," and to protect an individual's "use and possession of proerty from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivations of property . . . . "Id. at 81.

Paula Marshall was a party to and participated in the proceedings leading to her eviction and that of the other occupants. She admittedly abused the bankruptcy process to give an extra four months to her and the other occupants to litigate their claims. Paula Marshall used this time to file a declaratoory relief action seeking

to set aside the sale of the home to Martin. The time was also used by Stephanie Schneider to file a claim of possession. There is no legal requirement to serve a new notice. Clearly, all of the appellants were aware of the eviction proceedings and all have had a sufficient opportunity to have their claims heard. We find therefore that the failure to serve a new notice to vacate did not violate the appellants' due process rights.

II. The Automatic Bankruptcy Stay

The appellants argue that the district court erred in finding that they lack standing to attack a violation of the automatic stay imposed pursuant to 11 U.S.C. S 362 in accordance with Paula Marshall's second personal petition for bankruptcy. They argue that they have standing because they are "family members of a Chapter 13 debtor who have a possessory interest in the family home through

rights conferred by the debtor." We disagree.

Section 362 provides, in relevant part, that:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title . . . operates as a stay, applicable to all entities, of--
>
> > (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.

11 U.S.C. S 362 (a) (3). This provision is intended to benefit the debtor estate. Tilley v. Vucurevich (In re Pecan Groves of Arizona), 951 F.2d 242, 245 (9th Cir. 1991). Section 362 does not confer any rights to outside parties. Magnoni v. Globe Inv. and Loan Co. Inc. (In re Globe Inv. and Loan Co. Inc.), 867 F. 2d 556, 560 (9th Cir. 1989).

The appellants argue that their case can be distinguished because it deals with a Chapter 13 bankruptcy rather than a

Chapter 7 bankruptcy. They cite 11 U.S.C. S 1301, which provides for an automatic stay of action against a codebtor in Chapter 13 cases. They then cite S 1301's legislative history for the proposition that it was designed to protect a debtor by insulating him or her from the indirect pressures from his or her creditors exerted through friends or relatives that may have co-signed an obligation of the debtor. See H.R. Rep. no. 95-595, 95th Cong., 1st Sess. 426 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 6381. From this, the appellants reason that Congress extended the scope of the automatic stay in Chapter 13 cases to protect family members, and therefore, family members should have standing to attack a violation of an automatic stay.

The appellants' argument is unpersuasive. Family member standing in bankruptcy proceedings does not follow from the fact that Congress insulated debtors from the indirect pressures of creditors exerted

through friends or relatives that may have cosigned an obligation of the debtor. The appellants do not show what purpose would be served by allowing a debtor's family members to challenge violations of an automatic stay in the debtor's bankruptcy proceedings. It would appear that a debtor's interest in his own possessions would be sufficient to protect that of family members. We therefore agree with the district court that the appellants lack standing to attack a violation of the automatic stay imposed pursuant to S 362 in accordance with Paula Marshall's second personal petition for bankruptcy.

III. Innenberg's Liability for the Search of the Appellants' Personal Possessions

There is no evidence in the record that Innenberg searched any of the appellants' possessions. The appellants

argue, however, that thedistrict court was required to inter that he searched their possessions because there is evidence of a general search of the home. This argument is unpersuasive -- evidence of a general search is not evidence that the appellants' possessions were searched.

The district court granted the County of San Bernardino's motion for summary judgment based on the appellants' failure to produce any evidence that their "personal belongings or property were searched." We find this reasoning sufficient to affirm the district court's grant of summary judgment as to Innenberg's liability for the search. See City of Las Vegas v. Clark County, 755 F.2d 697, 701 (9th Cir. 1985) (holding that the district court may be affirmed on any basis fairly supported by the record). 3

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3 Because our decision as to Innenberg's liability is based on the fact that there is no evidence that Innenberg searched any of the appellants' possessions, we need not address whetner Innenberg acted under color of state law.

IV. Rule 36 Admissions

Marshall argues that the district court abused its discretion in denying him leave to withdraw or amend admisssion number 11, which states that he "was not deprived of any Federally protected rights as a proximate result of any official policy or custom of the County of San Bernardino."4 We disagree.

Rule 36 (a) of the Federal Rules of Civil Procedure provides that a matter is deemed admitted unless, "within 30 days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admissions a written answer or objection addressed to the matter, (and) signed by the party or the party's attorney . . . " Any matter admitted in response to a request for admission is conclusively established unless the

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4 In his opening brief, Marshall concedes that the other admissins deemed admitted are no longer important to his case.

court permits withdrawal or amendment of the admission. Fed. R. Civ. P. 36 (b); accord 999 v. C.I.T. Corp., 776 F.2d 866, 869 (9th Cir. 1985). The court may permit withdrawal or amendment of an admission "when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits." Fed. R. Civ. P. 36 (b); 999, at 869.

The Marshall defendants requested admissions pursuant to Rule 36. Marshall's response was insufficient and the admissions were deemed admitted. When dismissing Marshall's Fourth Amendment claims for unlawful arrest and confinement without probable cause, the district court relied on the following admissions:

> (1) (that) defendant Innenberg was not acting within the course and scope of his employment with the defendant county when he participated in (Marshall's) eviction on July 10, 1989; (2) (that) Marshall barricaded

> himself inside his house and threatened to kill deputy Weinberg if he attempted to evict (him); and (3) (that) the County sheriff's deputies had probable cause to arrest (Marshall) pursuant to California Welfare & Institutions Code S 5150.

These were the only admissions on which the district court relied to grant the defendants' motion for summary judgment.

Although Marshall argues that admission number 11 went to the very heart of his case, none of the admissions on which the district court relied concerned admission 11. As such, allowing Marshall to withdraw or amend admission number 11 would not have affected the district court's grant of summary judgment. Under these circumstances, we find that the presentation of the merits of the action would not have been "subserved" by permitting withdrawal or amendment of admission of number 11. The district court did not abuse its discretion in dnying Marshall's motion.

V. Excessive Force

Marshall argues that Innenberg and the

deputy marshal who initially attempted to evict the occupants used excessive force by entering the home with their guns drawn.5 We disagree.

A person who claims excessive force was directed at him or her can only raise a Fourth Amendment claim. Curnow v. Ridgecrest Police, 952 F.2d 321, 325 (9th Cir. 1991), cert. denied, 113 S. Ct. 460. "Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the counter-vailing governmental interests at stake." Graham v. Connor, 490 U.S. 386, 396 (1989) (quotation marks and citations omitted). Because the "test of reasonableness under the Fourth Amendment is not capable of

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5 Though there is conflicting evidence over whether Innenberg and the deputy marshal actually entered the home with their guns drawn, that fact is assumed for the purposes of this disposition.

precise definition or mechanical appli-

precise definition or mechanical application, . . . its proper application requires careful attention to the facts and circumstances of each particular case.
. . . " Id. (quotation marks and citations omitted). The reasonableness of a particular use of force is judged from the perspective of a reasonable officer. Id.

Innenberg and the deputy marshal were about to forcibly evict occupants who had gone to extraordinary lengths to prevent the eviction. Those who perform forced evictions can become involved in very dangerous situations as evidenced here by Jack Marshall's refusal to leave the premises and the resultant armed standoff. There is no evidence that the entry with guns drawn caused any occupant to suffer harm. Accordingly, we agree with the district court that the fact that Innenberg and the deputy marshal entered the home with thheir guns drawn, without

more, was reasonable as a matter of law. The appellants' excessive force claims were properlyy dismissed.

IV. Motion to Reopen Discovery

The Schneiders argue that the district court abused its discretion in denying their motion to reopen discovery because their attorney, Alan Rosenberg ("Rosenberg"), who withdrew from the case because of illness, did not conduct adequate discovery. We disagree.

The record supports the district court's reasons for denying the Schneiders' motion to reopen discovery: The district court correctly pooints out that any discovery produced in the Marshall case, which involved the same defendants and essentially the same issues as in the Schneider case, could be used in the Schneider case. The record indicates that Rosenberg relied extensively on the assistance of Paul Marchand ("Marchand") in both the Marshall and Schneider cases. 6 Rosenberg's motion

to withdraw was granted more than a month before the end of discovery, during which time discovery could have been conducted "without the alieged hindrance of an ill counsel."

Furthermore, the record does not indicate that Rosenberg's illness prevented him from conducting adequate discovery in the Schneider case. By his own admission, Rosenberg was not ill when the Schneider complaint was filed or for several months afterward. Moreover, neither Rosenberg's nor Marchand's declaration indicate that Rosenberg's illness prevented him from effectively representing the Schneiders before he moved to withdraw as their counsel in December of 1991.

Finally, while the Schneiders' new

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6 The schneiders argue that Marchand never apeared in their case or signed any pleadings. Our review of the record, however, reveals that Rosenberg entrusted preparation for the joint status conference to Marchand, that Marchand made "a special appearance" when he participated in the preparation of the status conference brief, and that Marchand signed the status conference brief as a "co-counsel."

attorney may have believed that additional discovery was necessary, he does not explain what he hoped to discover that would have precluded summary judgment. The district court obviously felt that the discovery already conducted as adequate, and we cannot say that the district court abused its discretion in denying the Schneiders' motion to reopen discovery.

AFFIRMED.

APPENDIX B

Not For Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACK MARSHALL,
Plaintiff-Appellant,

v.

SAN BERNARDINO COUNTY,et al.,
Defendants-Appellees

No. 92-55994

D.C. No.
CV-89-0799-AHS

ORDER

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Before: Thomas Tang,
Harry Pregerson, and
John T. Noonan, Jr, Circuit Judges

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JACK MARSHALL, et al.,
Plaintiffs

v.

COUNTY OF SAN BERNARDINO, et al.,
Defendants

Case No. SA CV 89-799 AHS (RWRx)

CIVIL MINUTES GENERAL

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Dated June 29, 1992

Before: Alicemarie H. Stotler, Judge

PROCEEDINGS: (IN CHAMBERS)

ORDER DENYING PLAINTIFF'S "MOTION TO RECONSIDER DENIAL OF MOTION TO RECONSIDER SUMMARY ADJUDICATION OF ISSUES ENTERED JULY 15, 1991 (PAPER # 66) AND STATEMENT OF UNCONTROVERTED FACTS AND CONSLUSIONS OF LAW (PAPER #65); "DENYING PLAINTIFF'S" RENEWED MOTION FOR LEAVE TO WITHDRAW OR AMEND RESPONSE TO REqUESTS FOR ADMISSIONS SO AS TO RECORD DENIALS TO REQUESTS FOR ADMISSIONS #4, 6, 9, 10 AND 11"

On May 26, 1992, plaintiff filed a "Motion to Reconsider Denial of Motion to Reconsider Summary Adjudication of Issues Entered July 15, 1991 (Paper #66) and Statement of Uncontroverted facts and Conclusions of Law (Paper #65)." No

opposition was filed. The matter was originally set for hearing on the Court's June 15, 1992 calendar, but was reset by the Court to the Court's June 29, 1992 calendar. On June 1, 1992, plaintiff filed a joint "Stipulation Concerning Plaintiff's Renewed Motion for Leave to Withdraw or Amend Responses to Requests for Admissions so as to Record Denials to Requests for Admissions: #4, 6, 9, 10 and 11." Defendant County of San Bernardino filed a supplemental opposition to the motion to withdraw or amend responses on June 16, 1992. Plaintiff's motion to withdraw or amend responses was set for hearing on the Court's June 29, 1992 calendar.

The Court, having received, read and considered the foregoing, finds the matters appropriate for submission on the papers without oral argument. See Local Rule 7.11 (the Court may dispense with oral argument on any matter unless otherwise required);

Fed. R. Civ. P. 78. The matters are, therefore, removed from the Court's June 29, 1992 calendar.

The Court denies plaintiff's motion for reconsideration. The sole ground on which he bases his motion is that proof of service was included in his original motion for reconsideration; however, the Court denied plaintiff's original motion for reconsideration both on the ground that it did not appear to have been served on defendants and that plaintiff failed to satisfy any of the recognized grounds for reconsideration set forth in Local Rule 7.16. Therefore, that plaintiff did in fact include a proof of service with the original motion for reconsideration does not mitigate in favor of granting the plaintiff's instant motion, since he has still failed to produce grounds for reconsideration as enumerated in Local Rule 7.16. Accordingly, the Court denies plaintiff's motion for reconsideration.

On the merits of his motion to withdraw or amend responses, plaintiff argues: (1) in French v. United States, 416 F.2d 1149 (9th Cir. 1988), the Ninth Circuit adopted the view that admissions should be avoided where to do so would aid the trier of fact in the presentation of the evidence and no prejudice to the requesting party would result, a standard plaintiff argues is satisfied here since (a) the County would suffer no prejudice from responses of denial in light of its May 21, 1991 stipulation that such denials could be made and (b) the illness of plaintiff's prior counsel excuses plaintiff's delay in seeking to formally deny defendants' requests for admissions; and (2) if a jury were to believe plaintiff's denials of defendants' requests for admissions, plaintiff would prevail.

In opposition, defendant County notes that: (1) plaintiff has never filed a verified response to the requests for

admission; (2) the May 21, 1991 stipulation states only that plaintiff "will provide the factual basis for the (asserted, unverified) denial (of the requests at issue" by May 29, 1991, "which plaintiff never did and therefore admissions were obtained by default; and (3) plaintiff was represented by two attorneys at the time, only one of whom suffered from a long-term illness which affected his ability to represent plaintift adequately.

Moreover, in its supplemental opposition the County argues that the applicable standard is not found in French, but rather in Fed. R. Civ. P. 36 (b), which provides: "the Court may permit withdrawal or amendment (of an admission) when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the Court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits." The County argues that plain-

titf has failed to satisfy his burden of of showing that the presentation of the merits of the action will be served by allowing an amendment whereas the County will be prejudiced by allowance of the amendment, since any discovery it could pursue now would produce "diluted facts" from witnesses whose recollections have clouded over time. See Brooke Village North Associates v. General Electric Company, 686 F.2d 66, 70 (1st Cir. 1982) (prejudice may be established under Fed. R. Civ. P. 36 (b) by the unavailablity of of key witnesses).

The denial ot plaintiff's motion to withdraw or amend responses should stand, n light of the apparent difficulty the ounty would have in proving its case now n the absence of the admissions, since otential declarants' memories undoubtedly ill have faltered. See Id. Moreover, here is no showing that the presentation the merits would be enhanced by allowing

withdrawal or amendment of the responses, since judgment has already been entered in favor of the County. As stated, the Court denies plaintiff's motion to reconsider the motion to reconsider.

The Clerk shall serve this Order on counsel for all parties in this action.

Dated: 6-30-92
Signed: Karla J. Tunis, Deputy-Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JACK MARSHALL, PAULA DOLLIVER MARSHALL,
Plaintiffs,

v.

THE COUNTY OF SAN BERNARDINO, et al.,
Defendants

SA CV 89-799 AHS (RWRx)

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ORDER DISMISSING ACTION AND ENTERING JUDGMENT IN FAVOR OF DEFENDANT WALTER INNENBERG

NOTICE OF ENTRY AS REQUIRED BY FRCP RULE 77 (d)

FILED AND ENTERED JULY 27, 1992

I. BACKGROUND

On June 29, 1992, the Court heard oral argument on and granted defendant Walter Innenberg's motion for summary judgment in the related case of Stephanie Schneider, et. al. v. County of San Bernardino, et. al., SA CV 91-237 AHS (RWRx). On the same day, the Court ordered the remaining parties in this

action to file briefs noting the impact of the Court's ruling in Schneider. Remaining plaintiff Jack Marshall filed a "Brief Concerning the Implications of Rulings in Companion Case" on July 7, 1992. Remaining defendant Walter Innenberg (who was not named as a defendant in the caption of the Third Amended Complaint but was named in the body of the pleading, was named as a defendant in the captions of the three previous versions of the complaint, received notice of the Third Amended Complaint and participated fully in this action as a named defendant after the filing of the Third Amended Complaint) filed a "Response to Court's Order Re Impact of Ruling on Companion Matter" on July 15, 1992. Plaintiff has filed no reply. The Court now issues its ruling dismissing this action and granting judgment in favor of defendant Walter Innenberg, in light of the res judicata effect of the

Court's ruling in the related Schneider case on June 29, 1992.

II. ANALYSIS

In requesting briefing from the parties with regard to the impact of the Court's June 29, 1992 rulings in Schneider, the Court raised sua sponte the issue of res judicata but allowed the parties an opportunity to comment on its implications with regard to plaintiff's claims against defendant Innenberg. In his response to the Court's briefing request, plaintiff states that he "can see no factual distinction between the two cases in this regard" and appears to ask the Court to order a post-adjudication consolidation of the Schneider and Marshall actions for purposes of appeal. Defendant Innenberg responds that "the findings and orders in Schneider are res judicata as to Marshall." The Court agrees with the parties that the Court's rulings with regard to the claims asserted against defendant Innenberg in Schneider have a

res judicata effect on the claims asserted against him in this action. See Robi v. Five Platters, Inc., 838 F.2d 318, 321-22 (9th Cir. 1988) ("(t)he doctrine of res judicata ... treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same 'claim' or 'cause of action." (quotations and citations omitted)). Accordingly, the Court orders that this action be dismissed and that judgment be entered in favor of defendant Walter Innenberg forthwith.

III CONCLUSION

In light of the Court's June 29, 1992 rulings in favor of defendant Walter Innenberg on the claims asserted against him in the related case of Stephanie Schneider, et. al. v. County of San Bernardino, et. al., SA CV 91-237 AHS (RWRx), the Court finds that res judicata bars the relitigation of these same claims in this action and there-

fore orders that this action be dismissed and judgment be entered in favor of defendant Walter Innenberg forthwith.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the clerk shall serve a copy of this Order on counsel for all parties.

Dated: July 27, 1992.

Signed: ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE